

# Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 24 August 2017<sup>1</sup>.

## Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2018

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

### Overview of the Bill

In 2002, the United Nations adopted the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) with the aim of establishing ‘a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’ (OPCAT Article 1).

On or about 21 December 2017, Australia ratified OPCAT.

Australia’s immediate obligation under OPCAT is to allow the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee) to conduct periodic visits to places of detention in Australia.

The purpose of the Bill is to establish the necessary legislative arrangements for the Subcommittee to inspect places of detention in the Northern Territory (NT).

In summary, the Bill:

- a) defines places of detention for the purpose of Subcommittee visits;
- b) sets out the relationship between the Bill and other laws of the NT;
- c) provides for arrangements for the Subcommittee visits, including establishment of Ministerial arrangements for the purpose of facilitating Subcommittee visits;
- d) sets out the duties of detaining authorities and the responsible Minister;

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<sup>1</sup> Acknowledgement that this Statement is based upon the Statement made by the Australian Capital Territory in relation to the *ACT Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*

- e) provides for the Subcommittee to access places of detention, access information and interview detainees and other people; and
- f) protects against action for giving information and against reprisal for disclosing information.

The operation of this Bill needs to be considered in conjunction with the provisions in OPCAT together with the 'Guidelines of the Subcommittee on visits to States' and the Subcommittee's 'Outline of a regular SPT visit', which provide clarity about the conduct of the Subcommittee during visits.

### **Human rights implications**

This Bill engages a number of rights protected under the International Covenant on Civil and Political Rights (ICCPR). It supports Article 7 – protection from torture, inhuman or degrading treatment; and Article 10 – humane treatment when deprived of liberty, in particular section 19(1). It may limit Article 17 – right to privacy and reputation.

#### ***Right to protection from torture, inhuman or degrading treatment – Article 7***

This Bill supports Article 7 of the ICCPR, the right to protection from torture and cruel, inhuman or degrading treatment:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Article 7 of the ICCPR is consistent with article 5 of the Universal Declaration of Human Rights. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was developed having regard to these two articles<sup>2</sup>.

The objective of OPCAT is to 'establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'<sup>3</sup>.

#### ***Right to humane treatment when deprived of liberty – Article 10***

This Bill establishes the NT legislative framework to allow visits by the Subcommittee to places of detention in the NT, which is the immediate obligation under OPCAT.

This Bill supports Article 10 of the ICCPR, the right to be treated humanely when deprived of liberty:

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

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<sup>2</sup> [\*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\*](#), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, ratified by Australia 8 August 1989.

<sup>3</sup> [\*Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment\*](#), adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

The UN General comment no. 21 on article 10 of the ICCPR recognises that this right applies to anyone deprived of liberty under the authority of local laws, including in correctional institutions and psychiatric hospitals<sup>4</sup>. The General comment identifies that this right imposes a positive obligation on the jurisdiction towards people who are ‘particularly vulnerable because of their status as persons deprived of liberty, and complements ... the ban on torture or other cruel inhuman or degrading treatment or punishment ...’ (para 4).

By establishing an NT legislative framework to allow visits by the Subcommittee, this Bill establishes one of the mechanisms through which the NT will meet its positive obligations under this right.

### ***Right to privacy and reputation – Article 17***

This Bill may limit Article 17 of the ICCPR, the right to privacy and reputation:

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.”

Clauses 10 to 13 and 16 of the Bill may limit an individual’s right to privacy.

The right to privacy is relative and may be limited to the extent necessary, reasonable and proportionate to achieve a demonstrated and justifiable purpose (UN Human Rights Committee, General Comment 16). Such limits must not be ‘unlawful’ or ‘arbitrary’. This means that interferences must only be authorised by precise and circumscribed law (including clear and relevant criteria) and must not give overly broad or unnecessary discretion to authorities.

Clauses 10 and 11 provide that, if the Subcommittee requests access to a place of detention, the Minister and detaining authority must ensure that the Subcommittee and any accompanying experts or assistants are given unrestricted access to every part of the place of detention for the purpose of exercising their functions under OPCAT. This access is limited where there are ‘urgent or compelling grounds of national defence, public safety, natural disaster or serious disorder.’ A detaining authority may also limit access where the NT has requested that an objection be made or where the Commonwealth Attorney-General has made an objection and that request has not yet been resolved.

Clause 12 provides for the Subcommittee to access all relevant information for evaluating the needs and measures to strengthen, if necessary, protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment.

The purpose of this limitation is to ensure that the Subcommittee is able to undertake its mandate to ‘prevent torture and other cruel, inhuman or degrading treatment or punishment and to strengthen the protection of persons deprived of their liberty against torture and other forms of ill-treatment’<sup>5</sup>. Without the required level of access to places

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<sup>4</sup> United Nations, Office of the High Commissioner for Human Rights, [General Comment No. 2:1 Replaces general comment 9 concerning humane treatment of persons deprived of liberty \(Art. 10\):10/04/1992](#).

<sup>5</sup> [Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment](#), guideline 1.

of detention and relevant information, the Subcommittee would not be able to effectively carry out its role.

The limitations on privacy are minimised through the Subcommittee's guidelines. Generally, the Subcommittee 'carries out [its] visit according to the principle of co-operation and maintains strict confidentiality concerning its work and findings'<sup>6</sup>.

As outlined above, the Commonwealth Attorney-General is able to object to visits to a requested place of detention on certain grounds and the NT is able to request that the Commonwealth Attorney-General lodge such an objection (clause 11(2) and (3)). The Subcommittee has no coercive powers to enforce compliance with any of its requests.

The Bill clearly limits the scope of the information that must be provided to the Subcommittee to 'relevant information ... for the purpose of evaluating the needs and measures that should be adopted to strengthen, if necessary, the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment' (clause 12(1)).

The Subcommittee's guidelines contain a number of guidelines about access to information and the manner in which the Subcommittee is to deal with information. Guideline 5 provides that as a general rule, the Subcommittee considers that photo documentation from places of detention is unnecessary and does not use this modality. If, in exceptional circumstances, this is regarded as essential express acceptance must be gained from the head of the delegation<sup>7</sup>.

Guidelines 5.23 and 5.26 provide that the guiding principle for the Subcommittee is to highlight generic and systemic issues, rather than individual issues. The Subcommittee may only 'address the State party about individual cases, if it deems it necessary in order ... to avoid irreparable damage to the person(s) concerned' and then only with the consent of the individual concerned<sup>8</sup>.

Part III of the guidelines clearly sets out the Subcommittee's confidentiality obligations, including that information gathered by the Subcommittee is and must remain confidential and that no personal data is to be published without the express consent of the person concerned. Members of the Subcommittee, experts and other people accompanying the Subcommittee have an express obligation to uphold confidentiality in relation to any information that they become aware of while carrying out their duty<sup>9</sup>.

The purpose of the Bill is to facilitate visits of the Subcommittee with the aim of preventing torture and other forms of ill treatment and making systemic recommendations to strengthen the protection of detainees. This necessarily involves striking a balance between the right to privacy and ensuring that a detainee is protected from torture and other cruel, inhuman or degrading treatment or punishment. In view of the purpose of this Bill, any limitations on the right to privacy are the least restrictive available to achieve this purpose.

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<sup>6</sup> [\*Outline of a regular SPT visit\*](#)

<sup>7</sup> [\*Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment\*](#), guideline 5, para 22.

<sup>8</sup> [\*Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment\*](#) guideline 5, paras 24 and 26

<sup>9</sup> [\*Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment\*](#), part III, guideline 10

The offence in clause 15 limits the Government's ability to take disciplinary action against a person who discloses information to the Subcommittee. This clause seeks to address the obligation in Article 15 of the OPCAT that obliges the NT Government to protect any person who provides information to the Subcommittee from any sanction or prejudice. Strong protection from reprisals encourages detainees and staff in NT places of detention to report issues or abuse to the Subcommittee without fear of adverse consequences.

To the extent that this clause limits an individual's right to privacy under Article 17 of the ICCPR, it is proportionate and justifiable.

The other provisions in the Bill do not engage human rights and freedoms.

### **Conclusion**

This Bill is compatible with human rights as it supports protection from torture, inhuman or degrading treatment and humane treatment when deprived of liberty and limits an individual's right to privacy only to an extent that is reasonable, proportionate, and necessary to achieve this objective.